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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-6547

JESSE BLACK, Petitioner

-vs-

STATE OF OHIO, Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

Respondent accepts the broad outline of the case as stated by petitioner but believes there are several areas in which the record does not support his statement of the facts involved in this case.

First, the statement that petitioner is mentally retarded does not appear in the record. The psychiatrist, Dr. Massie, testified that he was "mildly mentally deficient," Mit. Transcript, p. 34, and within the range of borderline mental retardation, Mit. Transcript, p. 24, which is significantly different.

Secondly, while the Mansfield Municipal Court had actually set aside the bench warrant upon which petitioner was arrested on February 11, 1974, the warrant to serve had not been recalled nor had the fact of its cancellation been communicated to the Mansfield Police Department. Thus, the arrest under it was valid. Moreover, incidental to this arrest, petitioner was found to have marijuana in his possession and was charged and held on that offense.

With respect to the various interviews of petitioner by the Mansfield Police Department, the record shows that before each conversation petitioner was advised of his rights in accordance with Miranda v. Arizona. While petitioner always refused to sign the rights card, he indicated he understood his rights on each occasion before he was interviewed. Further, while there is testimony by Ptl. Butler to the affect that petitioner asked to speak to his attorney before he made incriminating statements on February 11, Motion to Suppress, p. 35, this testimony is contradicted by Lt. Hriesik, Motion to Suppress, p. 30, who testified that petitioner did not ask to speak to his attorney.

It is suggested that petitioner's trial counsel offered petitioner's criminal record into evidence and thus prejudiced him before the jury. In reality, the discussion of petitioner's prior felony conviction took place out of the presence of the

jury. This was done by petitioner's trial counsel so that a determination could be made before the trial judge that petitioner's decision not to testify was completely voluntary. As the jury had been excused before this occurred, it could have in no manner affected their verdict, Transcript, p. 574.

At a number of points, petitioner's trial counsel is referred to as appointed. In fact, he was privately retained and paid by petitioner.

While petitioner's trial counsel admitted in closing argument that his client was involved in these crimes, this sort of an argument must be read in context. The evidence of petitioner's guilt was overwhelming at this point, and it is nothing more than good trial strategy to admit some involvement while attempting to avoid the element of intent so as to reduce the charge to a lesser offense than aggravated murder.

Finally, at the mitigation hearing, Dr. Massie, the psychiatrist appointed to examine petitioner, testified that while petitioner was borderline mentally retarded, neither armed robbery nor murder is a product of mental retardation, Mit. Transcript, p. 41.

A. UNDER ANY STANDARD FOR DETERMINING THE EFFECTIVE ASSISTANCE OF COUNSEL, THE RECORD SHOWS PETITIONER WAS EFFECTIVELY ASSISTED IN HIS DEFENSE BY RETAINED TRIAL COUNSEL WHO FILED NUMEROUS MOTIONS ON HIS BEHALF, PRESENTED DEFENSE WITNESSES AND CROSS-EXAMINED STATE WITNESSES IN SUCH A MANNER AS TO PERMIT HIS CLIENT TO HAVE THE BENEFIT OF EVERY RIGHT AND DEFENSE ENTITLED TO HIM UNDER THE CONSTITUTION OF THE UNITED STATES.

Respondent agrees that no test to determine the effective assistance of counsel has yet been adopted by this Court. Whatever the test, however, effective assistance of counsel is and must remain a question of fact. Petitioner lists seven separate examples of incompetency of trial counsel which respondent believes are either not supported by the record or show nothing more than tactics which petitioner's present counsel does not approve. First, it is alleged that petitioner's trial counsel, who petitioner privately retained, admitted that petitioner was guilty in both his opening statement and his closing argument.

Petitioner's current counsel has either misread the record or is intentionally trying to mislead this Court. With respect to the opening statement, petitioner's trial counsel stated as follows: (Transcript, page 8)

> "I further expect the evidence to show ultimately that Mr. Black was not engaged in the holdup or robbery of Mr. Staples at the beer dock; that he was not present when the person who did that shooting there and that he was not involved in that event directly either. Rather what I am suggesting to you is this. I fully and sincerely believe the evidence will reveal some complicity of criminal conduct or knowledge on the part of Jesse Black whether or not he testifies but that he is definitely not guilty of the aggravated murder of Olga Laderman and that he is not guilty of the aggravated murder of Robert Staples and feel when the evidence is in and in closing argument I will certainly suggest to you at that time what I believe the evidence has shown if it has shown some criminal conduct on the part of Mr. Black we will certainly admit that. I believe I will be able to state here in all sincerity and honesty and suggest to you no aggravated murder was committed by this man on January 21st of this year or any other time in his life."

Certainly by no stretch of the imagination is this an admission of petitioner's guilt to the jury.

With respect to the closing argument, petitioner's trial counsel stated in an attempt to explain some damaging evidence admitted against his client: (Transcript, page 617)

> "Basically what he tells you about the Olga Lederman death and he tells that in the alleged oral statement he made prior to the written statement is that he was about to leave that motel and she grabbed for the gun and it went off, it was an accident. All right it was an accident. There was no intent. He didn't want to shoot that woman. He didn't want to kill anybody."

Further, at pages 619-620 of the Transcript, petitioner's trial counsel argued as follows:

> "What I am suggesting to you basically is this. Jesse had some involvement in these things if nothing else. It is his gun and he was in the car but he had no involvement other than that. He had no involvement in both of them than that and he probably is an accomplice or whatever you want to call it. I am further suggesting to you that this man's statement and this type of evidence and on this evidence and in the absence of anybody else being in any way charged or implicated, although the information is abundant, that he should not be found guilty of aggravated murder."

This is a capital case. With the overwhelming evidence before the jury at this time pointing to the petitioner's guilt, it was nothing more than good trial strategy to admit some involvement by petitioner but attempt to avoid the element of intent which would have made the verdict one of guilty of aggravated murder. This is nothing more than good tactics and hardly an indication of incompetency when arguing to a jury.

Secondly, petitioner states that trial counsel unjustifiably introduced evidence to the jury of petitioner's felony convictions citing Transcript, page 577, and Mitigation, page 32. Again, petitioner has misread the record. The Transcript clearly shows that the jury was excused, Transcript, page 574, and the admission of the petitioner's criminal record was done out of their presence. This procedure was followed so that it would be clear that petitioner's decision not to testify was totally voluntary. Petitioner's trial counsel asked him a number of questions in front of the trial judge. Petitioner's criminal record was mentioned at this point, but since the jury was not present, it could hardly have influenced them.

With respect to its introduction at the mitigation proceedings, this occurred after guilt had been determined and in a proceedings before the trial judge. Obviously, this could not have influenced the jury adversely as they had completed their

function and were not present at this point.

Thirdly, it is incredibly suggested by the petitioner the trial counsel did not attempt to suppress petitioner's statements to the police, which took place after petitioner was arrested on a bench warrant which had, in fact, been set aside by an earlier court appearance. This argument ignores the fact that the warrant was never in fact recalled and thus the arrest under it was valid. Of greater importance was the fact that petitioner's trial counsel filed a motion to suppress all statements which was the subject of the lengthy pre-trial hearing. The motion was overruled and that decision was affirmed by the Court of Appeals and the Ohio Supreme Court. Thus, contrary to petitioner's allegation, trial counsel did raise this objection in the trial court in an effective manner.

Petitioner's fourth allegation of incompetency is difficult to understand. The state admitted in opening statement (Transcript, page 5) that the murder weapon was never located. The fact, therefore, that a witness testified that it had been destroyed does not seem to add much to the case that the jury did not earlier know. With respect to the suggestion that the Chief of Police was permitted to give his opinion as to the petitioner's guilt, the jury would hardly expect less from him. Certainly in the context in which this statement was made it had little influence.

Fifthly, it is suggested that petitioner's trial counsel brought out on cross-examination prejudicial evidence. It is apparent from reading the record that petitioner's trial counsel was searching for inconsistencies in the witnesses' testimony and probably trying to confuse the jury by stressing various minor points. While it may not have been particularly successful, it is hardly an indication of incompetence. Moreover, nothing elucidated by petitioner's trial counsel is of any significance in the total context of the trial.

Sixthly, petitioner's suggestion that trial counsel failed to employ an independent psychiatrist to examine petitioner

seems based on hindsight. Certainly the psychiatrist appointed by the court was not a prosecution witness. Petitioner presumes that a psychiatrist who would testify favorably to petitioner was available. It is at least as likely that another psychiatrist might have been less favorable to petitioner's position. Such speculative second-guessing does not show incompetence.

Finally, it is alleged that petitioner's trial counsel was not familiar with the various aspects of criminal procedure. In response to this charge perhaps it is more useful to look at what he did rather than what it is alleged he failed to do. He appeared with defendant at arraignment and at preliminary hearing in Municipal Court, filed a Demand for Discovery, filed a Request for Notice from the Prosecuting Attorney to use specific evidence, filed a Request for Bill of Particulars, filed a Motion to Suppress defendant's statements, filed a Motion for Bail, filed a Motion for Change of Venue, filed a Notice of Alibi, filed a Motion to Challenge the Jury Array, filed a Motion for Specific Instructions to the Jury, and a Motion for a New Trial. In addition, he participated at a pre-trial motion, a lengthy trial and mitigation proceeding producing over 1100 pages in transcript, he called eight defense witnesses and cross-examined twenty-nine state witnesses.

Respondent has no quarrel with the proposition that the petitioner is entitled to competent counsel, but competent defense does not mean successful defense or flawless defense or a defense which the hindsight of petitioner's present counsel would have conducted. By any of the tests for the competency of counsel which have been proposed, it is clear from the record that petitioner was ably defended by competent, privately-retained trial counsel. By any test this Court may choose to apply, the record does not support petitioner's claim that his trial counsel's incompetence denied him the effective assistance of counsel which the Sixth Amendment guarantees.

B. OHIO REVISED CODE SECTIONS 2929.03 (E) AND 2929.04 (B) PROVIDE A CONSTITUTIONALLY PERMITTED SYSTEM TO DETERMINE THE EXISTENCE OF MITIGATING FACTORS AT THE SENTENCING STAGE OF A CAPITAL CASE AFTER THE DEFENDANT'S GUILT AND THE PRESENCE OF AGGRAVATING CIRCUMSTANCES HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

The Ohio procedure for imposing the death penalty places the burden of proof upon the state to prove both the defendant's guilt of each and every element of the crime of aggravated murder and, in addition, the presence of certain specific aggravating circumstances. Both must be proven beyond a reasonable doubt. The question of whether there are mitigating circumstances remains separate and apart from guilt or innocence. The Ohio system for imposing the death penalty, then, involves two distinct stages. After the jury has found the defendant guilty of aggravated murder and of a specified aggravating circumstance, it becomes the function of the trial judge to determine the sentence based upon whether or not there are any mitigating circumstances.

This system is totally different from procedures found impermissible by this Court in Mullaney v. Wilbur, 421 U.S. 684 (1975) and In re Winship, 397 U.S. 358 (1970) where the burden of proof on a material issue concerning the question of guilt or innocence was placed upon the defendant. Under the Ohio procedure, the state must prove not only each and every element of the offense beyond reasonable doubt, but also each and every element of aggravation by this same standard. Section 2929.04 (B) of the Ohio Revised Code then comes into affect. It provides:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:
> (1) The victim of the offense induced or facilitated it."
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Petitioner presumes that this statute places the burden of proof upon the defendant. While, of course, it is in his interest to show mitigating circumstances exist, the statute does not place any burden on the defendant. The existence of mitigating circumstances is determined in a hearing before the trial judge after the defendant's guilt and the presence of aggravating circumstances have already been determined. A psychiatric report and pre-sentence study are required and these documents alone might be sufficient to show the existence of mitigation. The burden thus is as much upon the state to refute the existence of mitigating factors as it is upon the defendant to establish them. Unlike the statutes found unconstitutional in Mullaney and Winship, Ohio Section 2929.04 (B), Revised Code, does not place the burden of proof on the defendant on the critical issues of guilt or innocence or even the presence of aggravating circumstances. These must be proven by the state beyond a reasonable doubt. The existence of mitigation on the other hand, or its absence, can be proven by a preponderance of the evidence with both sides being free to submit evidence on this issue. As the defendant at this point has already been convicted, there is no longer a problem of self-incrimination and he may, therefore, testify freely.

Even if Section 2929.04 (B) can be read to place the burden of proof in the mitigation proceedings on this defendant, this is not constitutionally impermissible. This Court has approved, for example, the placing of the burden of proof upon the defendant in a criminal case on the issue of sanity. Leland v. Oregon, 343 U.S. 790 (1952). Under the Ohio procedure, the defendant's guilt has already been established, along with aggravating circumstances. Nothing in the Constitution prohibits placing upon the defendant a duty to show why leniency should be granted at the sentencing stage of the trial. As the Ohio Supreme Court noted in State v. Woods, 48 O. St. 2d 127, 137 (1976):

> "The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval

of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather, the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime."

Therefore, Section 2929.04 (B), Revised Code of Ohio, does not place upon the defendant any burden of proof with respect to guilt or innocence. Rather, it provides for a method to allow the trial judge to make the broadest possible inquiry on the issue of the existence of factors which mitigate against the death penalty in every case.

C. THE PROCEDURE FOR THE IMPOSITION OF THE DEATH PENALTY IN OHIO WHERE AFTER THE DEFENDANT HAS BEEN FOUND GUILTY OF AGGRAVATED MURDER BEYOND A REASONABLE DOUBT, AND, IN ADDITION, HAS BEEN FOUND GUILTY BEYOND A REASONABLE DOUBT OF A SPECIFIC AGGRAVATING CIRCUMSTANCE, THE TRIAL JUDGE CONSIDERS WHETHER THERE ARE ANY MITIGATING FACTORS WHICH PRECLUDE THE DEATH PENALTY IS CONSTITUTIONALLY PERMISSIBLE UNDER PROFFITT V. FLORIDA, 96 S. Ct. 2960 (1976).

The death penalty may be imposed in Ohio only when a jury finds a defendant guilty of the crime of aggravated murder and, in addition, finds that one of seven specific aggravating circumstances stated in the indictment occurred. Both findings must be beyond a reasonable doubt. Section 2929.03 (B), Revised Code of Ohio. These specific aggravating circumstances are listed in Section 2929.04 (A), Ohio Revised Code:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election."

"(2) The offense was committed for hire."

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code."

"(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."

"(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer."

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary."

Where the jury finds the defendant guilty beyond a reasonable doubt, both of the offense of aggravated murder and at least one of the above specifications, then a separate hearing is held before the trial judge on the question of mitigation. Section 2929.03 (D), Ohio Revised Code, requires both a pre-sentence investigation and a psychiatric examination report, both of which are provided to the defendant and the prosecutor. Compare Gardner v. Florida, 97 S. Ct. 1197 (1977). A further hearing at which other evidence may be introduced and the pre-sentence report and psychiatric examination challenged or supported is also held. Section 2929.04 (B), Ohio Revised Code, provides the criteria which the trial judge is to consider in deciding whether or not to impose the death penalty:

"(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:

"(1) The victim of the offense induced or facilitated it."

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Regardless of the penalty imposed, the defendant then has the right to appeal to a Court of Appeals and thereafter, in those cases in which the death penalty is affirmed, has a further right of appeal to the Ohio Supreme Court. Ohio Constitution, Article IV, Section 2 (B)(2)(a)(ii).

As this Court stated in Proffitt v. Florida, 96 S. Ct. 2960 at 2966:

> "And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Unlike the mandatory death penalty procedure found impermissible by this Court in Woodson v. North Carolina, 96 S. Ct. 2978 (1976) and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), the Ohio procedure provides a system to guide and channel the trial court's decision and thus avoid the total arbitrariness and capriciousness found unconstitutional in Furman v. Georgia, 408 U.S. 313 (1972). The Ohio procedure requires the trial judge to focus on the individual defendant and his specific crime in accordance with a precise criteria. This procedure occurs only after a jury has not only found the defendant guilty of the crime of aggravated murder, but has, in addition, found him guilty of a separate aggravating specification. An Ohio Court of Appeals and the Ohio Supreme Court then reviewed each case to guarantee a uniform application of the mitigating factors. As the Ohio Supreme Court said in the first case it decided under this procedure: State v. Bayless, 48 O. St. 2d 73, 86 (1976)

> "In addition, this court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges."

Like Georgia, Texas and Florida, Ohio has enacted the statutory scheme in response to Furman v. Georgia which provides for an informed, focused, guiding and objective inquiry on the question of whether the death penalty should be imposed. While varying in detail from those procedures already found constitutionally permissible by this Court, it provides the same guarantees that the death penalty will not be imposed in Ohio in a wanton or freakish manner.

Petitioner attacks the mitigating factors found in Section 2929.04 (B), Ohio Revised Code, as either illusory or overly

narrow to be meaningful. However, this Court has never specified what mitigating factors must be considered and has even approved in Gregg v. Georgia, 96 S. Ct. 2909 (1976), a system which provides that a jury may consider in mitigation circumstances not provided by statute. As this Court stated in Jurek v. Texas, 96 S. Ct. 2950 at 2956:

> "Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."

As with the Texas statute found constitutional in that case, the Ohio statute, Section 2929.04 (B), Ohio Revised Code, provides the trial judge with the guidance needed to determine the existence of mitigating circumstances and avoid the arbitrary and capricious application of the death penalty which the Eighth and Fourteenth Amendments to the United States Constitution prohibit.

D. THE STATEMENTS GIVEN TO THE POLICE BY PETITIONER WERE OBTAINED IN FULL COMPLIANCE WITH THIS COURT'S RULING IN MIRANDA V. ARIZONA AND SHOW A KNOWING AND INTELLIGENT WAIVER BY THE PETITIONER OF HIS RIGHT TO REMAIN SILENT.

The transcript of proceeding on defendant's motion to suppress shows that no violation of the defendant's rights as expressed by this Court in Miranda v. Arizona, 384 U.S. 436 (1966) occurred. It affirmatively establishes that defendant was advised of his rights numerous times by officers of the Mansfield Police Department, and that he voluntarily waived these rights and gave statements to the officers.

In the Miranda case, this Court said (at 444 U.S.):

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

The Mansfield Police Department complied with this directive.

The questioning of the defendant took place during a three-day period. On February 11, 1974, at 10:25 a.m., the defendant was read his rights by Lieutenant Charles Hriesik (Motion to Suppress, p. 57). At 1:45 p.m. on the same day, Lieutenant Hriesik again read the defendant his rights (Motion to Suppress,

p. 62). The next day, February 12, 1974, Patrolman Marcus Butler read the defendant his rights at 8:15 a.m. (Motion to Suppress, p. 5). At 10:15 a.m. that day the defendant stated to Lieutenant Hriesik that he knew what his rights were (Motion to Suppress, p. 8). At 10:20 a.m. Patrolman Butler read the defendant his rights again. (Motion to Suppress, p. 10). Captain Robert E. Krauss of the Ontario Police Department testified that the defendant was read his rights yet another time on February 13, 1974, at 4:05 p.m. (Motion to Suppress, p. 76).

Thus, the evidence adduced by the State at the Motion to Suppress established that the defendant was read his rights prior to questioning at least five times. The court admitted into evidence (Motion to Suppress, p. 104) five rights cards produced by the State, all of which were read to the defendant. We submit that the State proved that the police department fully complied with the Miranda decision by repeatedly advising the defendant of his rights before asking the defendant any questions.

This Court in Miranda also recognized that an accused could waive his right to remain silent and proceed to give a statement. In this case the defendant did waive his rights after being carefully advised of them by the police officers.

In Michigan v. Mosley, 96 S. Ct. 321 (1975), this Court established a test to determine when incustodial interrogation may resume after an initial decision by a defendant to remain silent:

> "...the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."
>
> Mosley at page 326

Here, the petitioner's right to cut off questioning was carefully honored. When he indicated he no longer wished to be questioned, the questioning ceased. True, as in Mosley, it was resumed, but only after petitioner was once again

advised of his rights as specified in Miranda and indicated a willingness to answer questions. Petitioner's right to have the questioning terminated was scrupulously honored and his subsequent admissions are therefore not barred by the holding in Miranda as interpreted by this Court in Mosley.

The defendant first made an oral statement to the police at 10:15 a.m. on February 12th at which time he stated he knew what his rights were and that he had shot and robbed the lady in Ontario (Motion to Suppress, p. 9). Prior to that statement he had been read his rights at least three times. The defendant also stated that he would tell the police the whole story if he could first talk to his father and girlfriend, which he was allowed to do. (Motion to Suppress, p. 42).

The defendant was again read his rights, and shortly thereafter at 10:25 a.m. he told Major O'Neil that "I shot the lady in Ontario." (Motion to Suppress, p. 11). When confronted with Jimmie Eatmon, the defendant told him that he robbed and shot the lady at the motel (Motion to Suppress, p. 14). The defendant also told his father that he shot the lady (Motion to Suppress, p. 65). When the defendant gave a written statement on February 13, he waived his rights in writing (Motion to Suppress, p. 77), and the Appellant admits in his brief that this was a valid waiver.

The statements given by the defendant were not involuntary. The evidence showed that the defendant was treated quite well. Whenever he asked to call his attorney, he was permitted to do so. His physical condition at the various times he was questioned was good (Motion to Suppress, pp. 23, 58, 102, 111). The defendant was fully aware of his rights. The defendant was certainly not held incommunicado. When he could not reach his father by telephone, a cruiser was dispatched to bring his father in to talk to him. On several occasions, the defendant was allowed to see his father, his girlfriend, his sister, and Reverend Griffith. When he was being questioned, he was given

frequent breaks, food, and cigarettes. No psychological coercion was used against the defendant, and no promises were made to him. The statements made by the defendant were voluntary and the trial court properly admitted them into evidence.

Not surprisingly there were contradictions in the evidence as to the circumstances surrounding the defendant's statement to the members of the Mansfield Police Department, but the trial judge resolved these conflicts in favor of the admissibility of the defendant's statement. This determination is fully supported by the record.

Petitioner never indicated a desire not to be questioned unless his counsel could be present. He made no request that counsel be appointed. His conduct and his responses to questioning throughout the period demonstrated his belief that he was represented by counsel and his confidence that he knew his rights and was in control of the situation. Having been fully advised of his rights on numerous occasions, he voluntarily gave incriminating statements to the police. Based upon the total circumstances, it is clear that the admissions of the defendant were made only after full compliance with the rules laid down by this Court in Miranda v. Arizona and were properly admitted against petitioner at the trial.

CONCLUSION

It is respectfully submitted that petitioner was ably represented, fairly tried, and his guilt established beyond any reasonable doubt. His conviction has been reviewed and found valid by unanimous votes of both the Ohio Fifth District Court of Appeals and the Ohio Supreme Court. Petitioner was sentenced in accordance with a statutory system which meets the Constitutional guidelines laid down by this Court in Gregg, Proffitt and Jurek. As justice has therefore been

served, a petition for Writ of Certiorari need not be granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief Opposing Petition for Writ of Certiorari was served by regular United States mail this 20th day of May, 1977, upon Bruce R. Jacob, The Ohio State University College of Law, 1659 North High Street, Columbus, Ohio 43210.

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